AT

UNITED NATIONS

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 610

Cases No. 640: ORTEGA
No. 647: HERNANDEZ
No. 648: CANALES
No. 660: GARCIA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 17 December 1991, Antonio Ortega, a former staff member of the United Nations, filed an application requesting that:

> "...the measures recommended by the Joint Appeals Board, be applied, to wit:
>
> 1. That the decision not to renew my contract be rescinded.
>
> 2. That if my contract is not renewed, I be paid a compensation in the amount of 2 years of my net salary at the time of my separation."

Whereas the Respondent filed his answer on 7 April 1992;

Whereas the Applicant filed written observations on 8 May 1992;

Whereas, on 29 September 1992, the Respondent submitted an additional statement and on 11 December 1992, the Applicant submitted his comments thereon;

Whereas, on 25 January 1992, Jorge Lautaro Canales Alegre, a former staff member of the United Nations, filed an application requesting the Tribunal:

"...to order:

(a) that the administrative decision of not renewing the Applicant's contract after 31 December 1990, be rescinded and direct the Respondent to reinstate the Applicant as a United Nations staff member, and

(b) payment to the Applicant of salary lost during the period of unemployment between the expiration of his contract and the reconstitution of his professional career.

Alternatively,

(c) in the event that compensation is being paid in lieu of reappointment, the Applicant respectfully requests the Tribunal to grant an award in the amount of two years net base salary at the time of separation."

Whereas the Respondent filed his answer on 21 July 1992;

Whereas the Applicant filed written observations on 29 September 1992;

Whereas, on 29 September 1992, the Respondent submitted an additional statement;

Whereas, on 27 January 1992, Harry Hernandez, a former staff member of the United Nations, filed an application requesting:

"...

3. ...to be reinstated in my previous position in the United Nations. I was terminated in my position by ... Director of CELADE[Latin American Demographic Centre]-Santiago Chile and ..., Chief of Administration Division of ECLAC, ... 1990 (...).

4. ...to recognize:

(a) that the decision of the Administration of ECLAC, ... was based on contradictory considerations because [the Administration] renewed some appointments to personnel who participated in the same transactions and refused to renew mine;

(b) that the decision, which was also reaffirmed by the Secretary-General, was discriminatory against me. ...;

(c) the Administration decision was an abuse of power, depriving me of the possibility to exercise the right to defend myself. In fact, the non-renewal of my contract constitutes the strongest sanction that could have been taken against me ... without letting my case to be presented before a committee qualified for this kind of sanction and it denied me the possibility of a less severe sanction;

(d) that after more than five years of services to the institution, with substantive contributions to CELADE which were well appreciated (...) I had a legal expectancy of renewal of my contract.

... the Administrative Tribunal to conclude as follows:

(a) that the Administration must give me a new appointment;

(b) that the appointment must be retroactive from 1 January 1991, or to order the payment of salary lost during the period of unemployment between that date and the new appointment;

(c) that if the Secretary-General decides not to reinstate me, [he] fix a compensation equivalent of two years of my salary at the time of my separation."

Whereas the Respondent filed his answer on 31 July 1992;

Whereas, on 29 September 1992, the Respondent submitted an additional statement and on 30 December 1992, the Applicant submitted his comments thereon;

Whereas the Applicant filed written observations on 26 October 1992;

Whereas, on 20 February 1992, Victor Garcia, a former staff member of the United Nations, filed an application requesting:

> "...that the decision in question be rescinded and, consequently, that orders be given that I be reinstated and that I be paid remuneration for the period during which I was barred from working by the aforesaid decision or, failing that, as recommended unanimously by the Panel, compensation equivalent to two years of my net salary at the time of separation."

Whereas the Respondent filed his answer on 30 September 1992;

Whereas, on 29 September 1992, the Respondent submitted an additional statement;

Whereas the facts in the cases are as follows:

The Applicant Ortega entered the service of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) on 1 March 1968, as an Economist-Demographer at the Latin American Demographic Centre (CELADE) in San Jose, Costa Rica, on a one year fixed-term appointment at the P-2, step II level. On 1 July 1971, he was given an intermediate-term appointment at the L-3 level, under the 200 Series of the Staff Rules. He served, thereafter, on a succession of intermediate-term appointments until 31 December 1990, the expiration date of his last appointment. At the time, he held the position of Chief of the CELADE Office in San Jose, at the L-4 level.

The Applicant Canales entered the service of ECLAC on 9 March 1984, as an Economist-Demographer at CELADE, in San Jose, Costa Rica. He was given a one year intermediate-term, project personnel appointment at the L-3, step IV level, under the 200 Series of the Staff Rules. He served, thereafter, on a succession of intermediate-term appointments until 31 December 1990, the expiration date of his last appointment.

The Applicant Hernandez entered the service of ECLAC on 1 September 1985, as a Senior Programme Technician at CELADE, in San Jose, Costa Rica. He was given a one year fixed-term appointment at the G-7, step II level. He served, thereafter, on a succession of fixed-term appointments until 1 January 1989, when his appointment was converted to an intermediate-term appointment at the L-2, step 1 level, as an Expert in Computer Operations Systems. This appointment was extended until 31 December 1990, the expiration date of his last appointment.

The Applicant Garcia entered the service of ECLAC on 18 February 1985, as a Demographer at CELADE, in San Jose, Costa Rica. He was given a one year intermediate-term, project personnel appointment at the L-2, step IV level, under the 200 Series of the Staff Rules. He served, thereafter, on a succession of intermediate-term appointments until 31 December 1990, the expiration date of his last appointment.

In July 1984, the Applicants and two other staff members (Messrs. Domingo Primante and Manuel Rincón), in the CELADE office, organized what is hereinafter referred to as "the cooperative", to purchase equipment, consisting of 3 microcomputers and 2 printers. The Applicants and the other staff members involved claimed this equipment was necessary to perform their functions, and, according to them, could not have been made available by the UN,in view of financial constraints. The equipment was used in the office on a

regular basis, without compensation, for every day activities, between 1986 and 1989.

The cooperative rented their microcomputer equipment to the UN, at the CELADE office, for use in seminars, workshops, training courses and other activities held in San Jose or elsewhere. In these instances, the cooperative usually designated the Applicant Hernandez, who was a computer specialist, to give to the fictitious suppliers the technical specifications of the machinery actually employed. Pseudo renting agreements for this equipment were then entered into on an "informal" basis, no written records being kept.

Once all the arrangements had been made and the services rendered, bills for use of the equipment were submitted to the UN Administration under fictitious names or in the names of third parties who had no connection with the renting of the equipment but served as intermediaries between the UN and the members of the cooperative, in order to disguise the true recipients of these payments.

Proceeds from the rentals were distributed among members of the cooperative, in proportion to their contribution to the purchase of the equipment. The accounts of the cooperative were kept by the Applicant Canales who periodically circulated financial statements among the other members. Fictitious payments to third parties were certified by the Applicant Ortega and approved by Mrs. Flora Fernández, the Principal Administrative Assistant.

These arrangements were the subject of an audit investigation of the CELADE office by two staff members of ECLAC. While the investigation was under way, on 29 January 1990, the Director of the CELADE office relieved the Applicant Ortega of his duties, with immediate effect. The decision was taken on the ground that the Applicant Ortega's conduct not only constituted a "demonstration of poor judgement by the staff involved" but "a breach of the UN Financial Rules on contracting for services and certification for payment."

An audit report by a mission conducted between 12-15 February 1990, records the auditors' interviews with the Applicants and other members of the cooperative, and with fictitious suppliers. Some of the Applicants gave their account of their involvement in the scheme.

On 26 February 1990, the Chief, Division of Administration asked the Applicants for their comments on this report. The Applicants, except for the Applicant Hernandez, submitted their comments on 7 March 1990, in separate communications. The Applicant Hernandez submitted his comments on 8 March 1990.

On 27 April 1990, the Chief, Division of Administration, sought clarification from the Applicant Canales on the rentals of micro computers and printers that were owned by the Applicant himself and not by the Cooperative. In replies dated 10 and 14 May 1990, the Applicant Canales admitted that his own computer equipment had been rented to CELADE on three occasions, during 1988 and 1989 and that payments for those rentals were made through third parties.

On 25 May 1990, the Chief, Division of Administration, submitted to the Controller at UN Headquarters and the Director of the Internal Audit Division, Department of Administration and Management, a report "summarizing the main developments, audit findings and exchange of correspondence" on the computer rental transactions. The total amount involved in these transactions was some $7,000, all of which, according to the record, appears to have been repaid to the UN.

On 20 June 1990, the Applicants submitted their comments on that report to the ECLAC Administration and to UN Headquarters.

In letters dated 26 October and 28 November 1990, the Chief, Division of Administration, and the Director of CELADE informed the Applicants Ortega, Canales, Hernandez and Garcia respectively, as follows:

> "1. As you know, your fixed-term appointment under the 200 Series of the Staff Rules expires on

> 31 December 1990. Given the circumstances of the computer rental transactions which came to light this year, and in consultation with Headquarters/New York, we are not in a position to offer you a renewal of this contract..."

On 23 November 1990, the Applicant Ortega requested the Secretary-General to review the decision not to renew his appointment. On 3 January 1991, the Applicant Ortega was informed that the decision would be maintained. On 5 December 1990, the Applicant Garcia requested the Secretary-General to review the decision not to renew his appointment. On 15 February 1991, the Applicant Garcia was informed that the decision would be maintained. On 6 December 1990, in separate letters, the Applicant Canales and the Applicant Hernandez requested the Secretary-General to review the decision not to renew their appointments. On 15 February 1991, the Applicant Canales and the Applicant Hernandez were informed that the decision would be maintained.

On 7 February, 25 February and 4 March 1991, the Applicants lodged appeals with the Joint Appeals Board (JAB). The Board adopted separate reports in each case.

The Board's salient considerations, conclusion and recommendations in its report on the Ortega case, dated 8 October 1991, read, in part, as follows:

> "Considerations
>
> ...
>
> 15. ... the Panel found that the appellant had committed infringements of the Staff Rules and of the Financial Rules for which he could be held accountable. [Particularly staff regulation 1.5, staff rule 101.6 (b) and (c), Financial Rule 110.21 and administrative instruction ST/AI/352 of 29 June 1988]
>
> 18. ... This was a serious error and a display of a lack of judgement particularly severe in the case of a Head of Office and Certifying Officer, which

justified the decision to relieve him of these functions. However, it did not necessarily justify the non-renewal of his appointment whose extension he had every right to expect.

19. The Panel next examined whether there had been a lack of due process, as the appellant argues, because no decision based on the alleged failure to meet the highest standard of integrity should have been taken without disciplinary proceedings under Chapter X of the Staff Rules, which are designed to establish or disprove such failure.

20. In this context, the Panel discussed the argument advanced by the Respondent that where there is a choice between recourse to disciplinary proceedings or administrative action, the Secretary-General is not bound to resort to the former but can have recourse to the latter. ...

...

24. ... The Panel considered that disciplinary proceedings would have allowed the appellant the chance to be vindicated and hence to continue under a renewed appointment. The view was expressed also that although the Secretary-General may have had the legal right to resort to administrative action, morally it would have been preferable to invoke disciplinary procedures. For, had the staff member held a permanent appointment, this would have been the only way to impose sanctions for his conduct. With 22 years of service, he should have been treated in the same manner.

25. ... The Panel also examined ... the question of whether the non-renewal of the appointment was too severe a sanction and whether it was arbitrary and due to bias against the appellant and hence, discriminatory.

26. The Panel was of the opinion that in the circumstances, the penalty was too severe. ...

Conclusion and Recommendations

28. The Panel agreed that ..., the administrative action taken against the appellant was tainted by the inconsistent behaviour and arbitrariness of the Administration with regard to the appellant's accomplices in the contested scheme. The Panel,

therefore, finds that if the decision not to renew his contract is not rescinded, the Appellant is entitled to compensation. The Panel recommends unanimously an amount of 2 years of his net salary at the time of separation as appropriate."

The Board's conclusions and recommendation on its report in the Garcia case, dated 20 November 1991, read as follows:

Conclusions and Recommendation

16. The Panel finds that in the light of the above considerations, the administrative action taken against the appellant was discriminatory. The Panel considers that if the decision not to renew appellant's contract is not rescinded, he is entitled to compensation. In view of the fact that the appellant had more than five years of service and could reasonably have expected a renewal of his appointment for at least two more years, the Panel recommends, unanimously, that the amount of such compensation should be the equivalent of two years of his net salary at the time of separation."

The Board's conclusions and recommendation on its report in the Canales case, adopted on 20 November 1991, read as follows:

Conclusions and Recommendation

19. The Panel finds that ... , the administrative action taken against the appellant was discriminatory. The Panel considers that if the decision not to renew appellant's contract is not rescinded, he is entitled to compensation. In view of the fact that the appellant had more than five years of service and could reasonably have expected a renewal of his appointment for at least two more years, the Panel recommends, unanimously, that the amount of such compensation should be the equivalent of two years of his net salary at the time of separation."

The Board's conclusions and recommendation on its report in the Hernandez case, adopted on 20 november 1991, read as follows:

> Conclusions and Recommendation
>
> 17. The Panel finds that in the light of the above considerations, the administrative action taken against the appellant was discriminatory. The Panel considers that if the decision not to renew appellant's contract is not rescinded, he is entitled to compensation. In view of the fact that the appellant had more than five years of service and could reasonably have expected a renewal of his appointment for at least two more years, the Panel recommends, unanimously, that the amount of such compensation should be the equivalent of two years of his net salary at the time of separation."

On 15 November 1991, the Director, Office of the Under-Secretary-General for Administration and Management, transmitted to the Applicant Ortega a copy of the JAB report and informed him that the Secretary-General, having re-examined the case in the light of the Board's report, had decided not to accept the JAB's recommendations and to maintain the contested decision not to renew his appointment. The Secretary-General's decision was based on the following considerations:

> "(a) The decision not to renew your fixed-term appointment was taken after it was established through an administrative investigation, including an audit mission, that you, who served as Chief of the CELADE office and were also Certifying Officer, had actively participated in the rental to that office of personal computers from a cooperative of which you were a member. You thus benefited from your official capacity which involved the authority to take decisions on procurement and payment of funds. Such acts were in clear violation of the Financial Regulations and Rules governing procurement. In addition, as Certifying Officer, you improperly certified fictitious bills in the name of third parties who then channelled the proceeds to the cooperative.

(b) In the view of the Secretary-General, it is clear that your conduct fell far short of the standards of integrity required of staff members by staff regulation 1.4 and that, therefore, the decision not no extend your appointment was fully justified.

(c) In the administrative investigation which was concluded you were afforded and availed yourself of the opportunity to state your case and your due process rights were respected.

(d) The Administration was under no obligation to resort to disciplinary proceedings instead of administrative action since, when several forms of action are available, it may resort to any one of them."

The Secretary-General also refused to accept the JAB's recommendations in the cases of the other Applicants and chose to maintain the contested decisions, for the same general reasons as in the Applicant Ortega's case.

On 12 December 1991, the Applicant Ortega filed with the Tribunal the application referred to earlier.

On 25 January 1992, the Applicant Canales filed with the Tribunal the application referred to earlier.

On 27 January 1992, the Applicant Hernandez filed with the Tribunal the application referred to earlier.

On 20 February 1992, the Applicant Garcia filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Applicant Ortega's long years of service created an expectancy that his appointment would be extended.

2. The Respondent's decision not to extend the Applicants' appointments was tantamount to dismissal and was taken without observing the applicable disciplinary procedures set forth in the Staff Regulations and Rules.

3. Since the Applicants were never charged with an offence, they were not given an opportunity to defend themselves at

a hearing during the course of an investigation, nor the opportunity to offer and provide evidence. The investigation conducted by the Respondent was not impartial.

4. The Respondent's decision was discriminatory in that he granted new contracts of employment to two other staff members with at least equal or greater responsibility for the alleged offence.

5. The arrangements for the rental of the microcomputers were not made with the intention to defraud the Organization. The Applicants made no profit from the arrangement and at no time did they believe they were infringing the UN Rules and Regulations.

Whereas the Respondent's principal contentions are:

1. Outstanding performance does not create a legal expectancy to further employment with the Organization. A staff member who has violated UN Financial Regulations and Rules and UN Staff Rules cannot have a right to further employment.

2. The decision to let the Applicants' appointments expire was taken in the light of investigations into their activities and in the light of the Applicants' explanations. This decision fully respected the Applicants' due process rights to reasonable consideration for further appointments, and was taken without improper motive or bias.

The Tribunal, having deliberated from 8 June to 1 July 1993, now pronounces the following judgement:

I. The applications filed by the Applicants Ortega, Hernandez, Canales and Garcia in cases No. 640, No. 647, No. 648 and No. 660, raise identical issues and contain similar pleas. Accordingly, the Tribunal orders a joinder of the cases.

II. The Applicants raise a number of issues: that there was an expectancy of renewal (in the case of the Applicant Ortega arising from 22 years of continuous outstanding service, with only two

years left to retirement); that the matter should have been dealt with by way of disciplinary procedure; that the Applicants were not given an opportunity to defend themselves, not having been given a hearing during the course of the investigation nor the opportunity to provide evidence; that the scheme was not concealed; that two persons, Mr. Hector Lartiga, Senior Administrative Assistant, and Ms. Flora Fernandez, Principal Administrative Assistant, knew of the scheme and that the latter made the administrative arrangements; that no sanction was applied against some other staff members who similarly participated in the scheme; that the audit team included an official who was involved in the matter; that documents were not sent to them and that no specific charge was made against them; that the money was returned.

III. The Respondent's main contentions are: that the Applicants' service does not create legal expectancy of further employment; that the Respondent was not under an obligation to resort to disciplinary proceedings, instead of administrative action; that the gravity of the Applicants' acts justified the non-renewal of their fixed-term appointments; that the decision not to extend their appointments was taken after a thorough administrative investigation into the computer rental scheme, including the audit carried out by the ECLAC Administration. Furthermore, as the entire professional staff of Celade/San Jose were involved in the scheme, one of them (who was shortly due to retire) and one General Service staff member involved, were allowed to remain, for the sake of continuity.

IV. There is overwhelming evidence of the existence of the so-called "cooperative". Indeed, the Applicants concede that it existed. By the manner in which they operated the cooperative, the Applicants violated several rules.

V. The operation of the scheme, consisted normally, of the use by Celade of the microcomputers owned by the members of the co-operative, free of charge. However, on some occasions, the cooperative rented the microcomputers for use in seminars, workshops, training courses and other activities held in San Jose or elsewhere. It was in these instances that the cooperative charged money for use of the equipment and employed names of fictitious third parties in order to collect payment. The plan did not preclude the use of the micro-computers for the greater part of the time for the benefit of countries in the region in an orthodox and honest way. There was no loss to Celade in this operation and it is something of a misnomer to say that $7,000 was "repaid" or "returned".

VI. It is in the light of the existence of the cooperative and its operation and the consequent violations that the Tribunal must examine the contentions. The JAB has found merit in some of the Applicants' contentions.

VII. After careful examination of all the elements involved, the Tribunal holds that because of the Applicant Ortega's length of service, he was entitled at the very least, to every reasonable consideration for further employment, though he had no legal expectancy of continued employment.

VIII. But what of the Respondent's decision not to resort to disciplinary procedure and instead to employ administrative action? The Tribunal stresses that the option of administrative action should only be resorted to when it does not prejudice or damage the position of staff and is not detrimental to staff. The Tribunal is of the view that in this case, the exercise of this power was detrimental to the Applicants, mainly for the reason that it excluded the possibility of any form of sanction other than separation.

IX. While the Tribunal is not satisfied that the Applicants have made out a case that they were not allowed to defend themselves or that they were not furnished with sufficient information or that they were not aware of the charge against them, the Tribunal is of the view that the ECLAC investigation was not satisfactory because of the membership of the investigation team.

The Tribunal is also of the view that the existence of the cooperative scheme was widely known. It does not accept the proposition put forward on behalf of the Respondent that while its existence was known, the actual circumstances of its operation were not known to persons other than the members of the cooperative and indeed, were not known to persons in authority. In the case of Ms. Fernandez, the Principal Administrative Assistant, the Tribunal feels that, she, at any rate, was not properly investigated as to the state of her knowledge.

X. A picture emerges, therefore, of a scheme which was widely known, tolerated by the Administration and of an investigation which was carried out in such a manner as to show selectivity and bias. Indeed, it could be said that bias was also shown in the manner in which other members of the cooperative were treated, based on the argument that they had to be retained in the interests of continuity - an argument which the Tribunal finds unacceptable.

XI. The other matter of which cognizance must be taken is that part of the Applicants' case, which the Tribunal accepts, namely that the equipment was bought by the Applicants to provide the office with needed equipment for more than four years, to the benefit of the countries in the region of Celade. The members did not make a profit but a loss on the eventual sale and they paid $7,000 to Celade. While there were financial irregularities, the Tribunal finds that there was no intention to defraud the United Nations.

XII. In the Tribunal's view these matters and the intentions and spirit of the members of the cooperative should have been taken into account, and were not, by the Respondent.

XIII. For the foregoing reasons, the Tribunal finds in favour of the Applicants, and:

Orders the Respondent to pay each of the Applicants, compensation in the amount of two years of their net base salary as at the date of their separation from service.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 1 July 1993

R. Maria VICIEN-MILBURN
Executive Secretary